United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: November 23, 2004

TO : Alan Reichard, Regional Director
Region 32

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Service Employees Local 817
(San Benito Health Foundation)
Case 32-CB-58401

536-2501-6000
536-2507
536-2522
542-3333-9200

The Region submitted this case for advice on whether the Union violated Section 8(b)(1)(A) and 8(b)(1)(B) of the Act when it threatened to sue the Employer if the Employer violated a California statute that the Ninth Circuit Court of Appeals had found to be preempted by the NLRA. We conclude that the Region should dismiss the charge, absent withdrawal, because the Union's threat to file a preempted lawsuit did not restrain or coerce the employees in exercising their Section 7 rights or the Employer in selecting its bargaining representative.

FACTS

In September 2000, California enacted Assembly Bill No. 1889 ("AB 1889" or "the statute").[1] AB 1889 forbids private employers who receive state grants or funds from using those monies to "assist, promote, or deter union organizing."[2] By that language, California intended to prohibit "any attempt by an employer to influence the decision of its employees . . . [on] [w]hether to support or oppose a labor organization that represents or seeks to represent those employees . . . [or on] [w]hether to become a member of any labor organization."[3] The statute specifically prohibits "any expense, including legal and consulting fees and salaries of supervisors and employees" incurred for the purpose of supporting or opposing union organizing.[4] The statute permits employer expenditures for

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[1] Cal. Gov't Code §§ 16645-16649.

[2] Cal. Gov't Code §§ 16645.2, 16645.7.

[3] Cal. Gov't Code § 16645(a)(1), (a)(2).

[4] Cal Gov't Code § 16646(a).

negotiating or administering a collective bargaining agreement, adjusting grievances, or negotiating, entering into, or carrying out a voluntary recognition agreement with a union.[5]

To ensure compliance, AB 1889 requires employers to certify that they have not spent state funds for prohibited purposes.[6] For those who make any prohibited expenditures, the statute requires them to maintain and provide upon request "records sufficient to show that state funds have not been used for those expenditures."[7] If an employer commingles state and other funds, the statute presumes that at least some state funds were used for the prohibited expenditures.[8] Employers who violate the statute are subject to various fines and penalties.[9] The State Attorney General or any private taxpayer may sue suspected violators to ensure compliance.[10]

In September 2002, a federal district court determined that certain sections of AB 1889 were preempted by the NLRA and it imposed an injunction prohibiting the State of California and the AFL-CIO from taking steps to enforce that statute against employers covered by the NLRA.[11] On April 20, 2004, the Ninth Circuit agreed that AB 1889 was preempted by the NLRA under Machinists Lodge 76 v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976), because it "undermine[s] federal labor policy by altering Congress' design for the collective bargaining process."[12]

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[5] Cal. Gov't Code § 16647(a), (d).

[6] Cal. Gov't Code §§ 16645.2(c), 16645.7(b).

[7] Cal. Gov't Code §§ 16645.2(c), 16645.7(c).

[8] Cal. Gov't Code §§ 16646(a), (b).

[9] Cal. Gov't Code §§ 16645.2(d), 16645.7(d).

[10] Cal. Gov't Code § 16645.8.

[11] See Chamber of Commerce of the United States, et al. v. Lockyer, 225 F. Supp.2d 1199, 1204 (C.D. Cal. 2002). The court did not determine whether other sections of the statute directed at public employers were preempted, because the plaintiffs did not have standing to challenge those sections. Id. at 1202-03.

[12] Chamber of Commerce of the United States, et al. v. Lockyer, 364 F.3d 1154, 1159 (9th Cir. 2004), motion for rehearing and rehearing en banc filed May 18, 2004.

On August 13, 2004, Service Employees Local 817 (the Union) sent a letter to San Benito Health Foundation (the Employer) stating that it represented a majority of the Employer's employees and was seeking voluntary recognition on that basis. In that letter, the Union also asked that the Employer "comply with [AB 1889] related to the use of public funds to discourage unionization." Enclosed with that letter was a copy of the statute and a flyer, entitled "Make sure your employer is not violating the law!," which explained the terms of AB 1889 and asked anyone who thought the Employer might be violating the statute to contact the Union. The letter further stated that "we are prepared to take whatever legal action to make sure that workers rights [are] protected."[13] The Union sent copies of the letter to employees on the Union's organizing committee, city and county officials, and the area's congressman and state assemblyman. By letter dated August 19, 2004, the Employer declined to extend voluntary recognition. On August 30, 2004, the Union filed a petition in Case 32-RC-5279 seeking a representation election.

The Employer receives a portion of its income from state funding, including state grants and contracts. Because of this, the Employer asserts that the Union's threat to enforce AB 1889 inhibits it from expressing its views on organizing and, as a result, denies employees their right under Section 8(c) of the Act to hear from their Employer during an organizing drive. The Employer asserts that this restrains or coerces employees in violation of Section 8(b)(1)(A). The Employer asserts that the Union's threat also restrains and coerces it in selecting its bargaining representatives, in violation of Section 8(b)(1)(B), because AB 1889 forbids the Employer from spending money on legal and consulting fees related to organizing.

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[13] Although that statement immediately followed a reference to potential violations of the NLRA, the enclosed flyer seeking information regarding violations of AB 1889 made clear the threat to bring action under that statute. The Union has not denied threatening to sue under AB 1889.

ACTION

We conclude that the Region should dismiss the charge, absent withdrawal, because the Union's threat to file a preempted lawsuit did not restrain or coerce the employees in exercising their Section 7 rights or the Employer in selecting its bargaining representative.

Although the Board cannot halt lawsuits alleged to be an unfair labor practice unless the lawsuit lacks a reasonable basis in fact or law and was filed with a retaliatory motive, it may enjoin preempted lawsuits without considering those factors.[14] But preempted lawsuits are not unlawful unless they violate NLRA strictures.[15] Here, assuming that a lawsuit seeking to enforce the terms of AB 1889 against this Employer would be preempted,[16] the Union's threat to file this preempted lawsuit did not violate Section 8(b)(1)(A) and 8(b)(1)(B) under traditional NLRA principles.

A. The Union's Threat to File a Lawsuit to Enforce AB 1889 Did Not Violate Section 8(b)(1)(A).

A union violates Section 8(b)(1)(A) if its conduct has a reasonable tendency to restrain or coerce employees in the exercise of their Section 7 rights.[17] Absent restraint or coercion of the unit employees, union lawsuits filed against employers do not violate Section 8(b)(1)(A).[18]

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[14] See Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 737 n.5, 744 (1983); Bakery Workers Local 6 (Stroehmann Bakeries), 320 NLRB 133, 138 (1995) (". . . a preempted lawsuit 'enjoys no special protection under Bill Johnson's.'").

[15] See Stroehmann Bakeries, 320 NLRB at 138; Loehmann's Plaza, 305 NLRB 663, 671 (1991) (". . . at the point of preemption, the special requirements of Bill Johnson's do not apply. Rather the 'normal' requirements of established law apply."), revd. on other grounds 316 NLRB 109 (1995).

[16] See Chamber of Commerce v. Lockyer, 364 F.3d at 1164.

[17] See Stroehmann Bakeries, 320 NLRB at 138.

[18] See Slate Workers Local 66 (Sierra Employer's Assn., Inc.), 267 NLRB 601, 602-603 (1983) (no Section 8(b)(1)(A) violation where union filed state court abuse of process lawsuit against employers' labor consultant who had filed and withdrawn 14 unfair labor practice charges against union during contract negotiations; unlike employees, whose right

In Stroehmann Bakeries,[19] after the employer improperly labeled one employee on the Excelsior list as a "quit," the union lost the representation election and the Board affirmed the results in a representation hearing. The union then sued the Board in federal court claiming the Board had acted outside its statutory authority by not requiring the employer to fulfill its Excelsior obligations.[20] The union included a breach of contract claim against the employer in which it sought damages equal to lost union dues.[21] The employer then filed a Section 8(b)(1)(A) charge alleging the union was restraining and coercing employees from exercising their Section 7 rights by trying to impose a union security obligation on them in disregard of the Board's prior determination in the representation case hearing.[22]

In finding that the union in Stroehmann Bakeries did not violate Section 8(b)(1)(A), the Board first held that the union's claims against the Board and the employer were preempted because they involved representation issues within the Board's exclusive jurisdiction.[23] Then, applying traditional NLRA principles, the Board held that the union's lawsuit against the employer did not violate Section 8(b)(1)(A) because it did not restrain or coerce the employees.[24] The Board relied on the fact that the union's lawsuit did not name the employees as defendants, did not seek to impose either a contract or a union-security obligation on the employees, and sought monetary

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to file charges is protected from union coercion by Section 8(b)(1)(A), employers do not have statutorily protected right to file charges). Cf. Hotel & Restaurant Employees Local 57 (Pittsburgh Fulton Renaissance Hotel), Cases 6-CB-10675, 6-CE-46, Advice Memorandum dated February 7, 2002, at pp. 8-9 (union's reliance on preempted city ordinance to get employer to agree to neutrality agreement did not restrain or coerce employees).

[19] 320 NLRB at 134.

[20] Id. at 134-135.

[21] Id. at 135.

[22] Id. at 133, 135.

[23] Id. at 137-138.

[24] Id. at 138.

damages only from the employer.[25] The Board also held that there was no restraint or coercion even though the union, which lacked majority support, could have become the employees' exclusive bargaining representative had it won in court. The Board reasoned that the union's peaceful invocation of judicial processes was not more coercive than the minority union's peaceful recognitional picketing in Curtis Bros.,[26] which the Supreme Court held did not restrain or coerce employees within the meaning of Section 8(b)(1)(A).[27]

We conclude that the circumstances in Stroehmann Bakeries are similar to those here and that the Union did not violate Section 8(b)(1)(A). Although the Union threatened to file a preempted lawsuit against the Employer, the threat did not "restrain or coerce" the employees from exercising their Section 7 rights. The Union did not threaten the employees with litigation, it did not seek to impose either a contract or a union security obligation on the employees, and potential litigation would not have exposed the employees to any liability.[28] Thus, the employees remained free to exercise their Section 7 right to seek a collective bargaining representative or to refrain from such activity.

Moreover, there is no merit to the Employer's assertion that its employees are being restrained and coerced because the Union's threat deprives them of their right under Section 8(c) to hear from their employer during an organizing drive. The Board relied on similar reasoning, i.e., that the NLRA statutory scheme encourages dialogue regarding the advantages and disadvantages of unionization, in arguing as an amicus in Lockyer that AB 1889 is preempted. However, the absence of an employer message about unionization could not "restrain or coerce" employees in exercising their Section 7 rights. In Stroehmann Bakeries, even though the minority union's lawsuit could have resulted in it becoming the employees' exclusive bargaining representative, the Board did not find

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[25] Id. at 138.

[26] See NLRB v. Teamsters Local 639 (Curtis Bros.), 362 U.S. 274, 290 (1960).

[27] See Stroehmann Bakeries, 320 NLRB at 138.

[28] See also Sierra Employer's Assn., Inc., 267 NLRB at 602-603.

restraint or coercion.[29] Certainly, where the Union seeks only to have the Employer remain neutral during the organizing campaign, and does not seek to impose itself as the employees' exclusive representative, employees would not be restrained or coerced from exercising their Section 7 rights.

B. The Union's Threat to File a Lawsuit to Enforce AB 1889 Did Not Violate Section 8(b)(1)(B).

A union violates Section 8(b)(1)(B) if its conduct restrains or coerces an employer in selecting its representatives for collective bargaining or grievance adjusting or by adversely affecting the manner in which the representatives perform these functions.[30] AB 1889 prohibits payments to lawyers, consultants, and supervisors for "supporting or opposing union organizing," which are not Section 8(b)(1)(B) functions. AB 1889 does not dictate which representative an employer must select for future collective bargaining or grievance adjustment purposes. Nor did the Union's August 13 letter to the Employer address that subject. Finally, as the Region notes, AB 1889 expressly permits the use of state funds for collective bargaining or grievance adjustment purposes; therefore, the Employer clearly remains free to choose a representative for such purposes without violating the statute. For all these reasons, the Union's threat did not violate Section 8(b)(1)(B).

In sum, we conclude that the Region should dismiss the charge, absent withdrawal.

B.J.K.

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[29] See also Curtis Bros., 362 U.S. at 290 (no restraint or coercion where minority union engaged in peaceful recognitional picketing).

[30] See generally NLRB v. Electrical Workers (IBEW) Local 340 (Royal Electric), 481 U.S. 573, 580 (1987); Teamsters Local 507 (Klein News Co.), 306 NLRB 118, 120 (1992).